

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Part 1 of the)
Commission's Rules —)
Competitive Bidding Procedures)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
WT Docket No. 97-82

To: The Commission

COMMENTS

Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the captioned Second Further Notice of Proposed Rule Making ("Second FNPRM"), adopted by the Commission on December 18, 1997, and released on December 31, 1997.

In the Second FNPRM, the Commission discusses the treatment of investors in designated entity applicants and licensees under the newly-adopted "controlling interest" small business size standard.¹ In particular, the Commission explains that:

under the proposed controlling interest standard [it] would apply the comprehensive affiliation rule to all investors in an applicant. Thus, passive interests that were otherwise non-attributable would be attributed if they are affiliates under this rule.²

As part of the proposed rules set forth in Appendix E to the Second FNPRM, the Commission also indicates that any person that manages the operations of an applicant or licensee pursuant to a "management agreement" or one who enters a "joint marketing

¹ Second FNPRM at ¶ 187.

² Id.

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arrangement" shall have an "attributable interest" under certain circumstances.³ For these purposes, the proposed rules borrow standards from the Commission's existing Commercial Mobile Radio Service ("CMRS") spectrum cap regulations.⁴

Though the Commission earlier sought comment regarding "whether the rules adopted in this proceeding should supersede all existing service-specific competitive bidding rules for future auctions,"⁵ it is not clear if certain of the rules adopted in the Third Report and Order or proposed in the Second FNPRM actually are meant to supersede existing competitive bidding and ownership rules for designated entities that have already been licensed.⁶ CIRI urges the Commission to make clear that any new attribution or affiliation rules developed in this proceeding will not be applied to the detriment of existing designated entity licensees.

This is particularly important in the context of the Commission's attribution and affiliation rules. The Commission developed its broadband PCS control group structures to permit a small business to attract capital without turning control of the auction applicant over to nonqualifying entities, effectively

³ Id., Appendix E at 3 (proposed §§ 1.2110(c)(2(ii)(H) & (I)).

⁴ Cf. 47 C.F.R. §§ 20.6(d)(9) & (10).

⁵ Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, FCC 97-60, ¶ 18 (rel. Feb. 28, 1997).

⁶ See Second FNPRM at ¶¶ 8, 10.

establishing a safe-harbor for small business auction participation. An important byproduct of this control group structure was certainty:

In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our attribution rules. Our attribution rules expressly permit applicants to disregard the gross revenues, total assets and net worth of passive investors, provided that an eligible control group has de facto and de jure control of the applicant. Our attribution rules are designed to preserve control of the applicant by eligible entities, yet allow investment in the applicant by entities that do not meet the size restrictions of our rules. Therefore, so long as the requirements of our attribution rules are met, the affiliation rules will not be used to defeat the underlying policy objectives of allowing such passive investors. More specifically, if a control group has de facto and de jure control of the applicant, we shall not construe the affiliation rules in a manner that causes the interests of passive investors to be attributed to the applicant.⁷

The Commission later articulated certain guidelines for identifying de facto control of an applicant by a control group.⁸

Similarly, in November, 1994, the Commission released new rules governing the attribution of spectrum under the Commission's 45 MHz CMRS spectrum cap for certain management and joint marketing functions.⁹ There, the Commission was clear:

⁷ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5620 (1994).

⁸ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447 (1994) ("Fifth MO&O").

⁹ Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Fourth Report and Order, 9 FCC Rcd 7123 ("CMRS Fourth Report and Order").

We expect that investor/manager agreements are one of the many alternatives available to designated entities and do not believe that treating management agreements as attributable for designated entities in exactly the same manner for spectrum cap purposes as for other entities will hamper the competitiveness of designated entities. This does not mean, however, that these management agreements will be deemed "attributable" for purposes of the revenue thresholds in the entrepreneur's blocks.¹⁰

Soon thereafter, the Commission reiterated its intention to encourage designated entities to "draw[] on managers with broad expertise."¹¹ To be certain, many designated entities structured relationships for spectrum auction participation and systems operation in reliance on these rules and policies.

Now, however, the Commission proposes to treat such management agreements and joint marketing arrangements as "attributable" under the controlling interest standard and to apply the affiliation rules to entities that otherwise meet the financial attribution tests. If so, CIRI urges the Commission to make clear that any such policy change will not be applied to

¹⁰ Id. at 7124 (footnote omitted) (emphasis added).

¹¹ Fifth MO&O, 10 FCC Rcd at 451 (footnote omitted). Specifically, the Commission said:

While we reject the view that scrutiny of management contracts should be relaxed, we also disagree with the view that such contracts should be subject to a stricter standard than we have applied previously. We conclude that limiting managers to discrete "subcontractor" functions . . . could prevent designated entities from drawing on managers with broad expertise. Moreover, whether a manager undertakes a large number of operational functions is irrelevant to the issue of control so long as ultimate responsibility for those functions resides with the licensee.

Id. (footnote omitted).

upset the settled expectations of existing designated entity licensees. Those who structured their relationships under the control group rules or entered otherwise nonattributable management or joint marketing arrangements should not suddenly be subject to new rules under which the same business associations are attributable.¹² The Commission might reasonably offer existing designated entities the opportunity to take advantage of any new controlling interest standards, but the Commission should not require them to do so, nor should it apply new attribution and affiliation rules to them as if they had.

Accordingly, if the Commission adopts new attribution or affiliation standards in this proceeding, the Commission should clarify that existing designated entity licensees may continue to operate under the attribution and affiliation rules that currently govern their relationships. These rules include both the service-specific regulations addressing designated entity ownership and control and the Commission's stated policy regarding the non-attribution of management and joint marketing arrangements for purposes of the revenue thresholds in the entrepreneur's blocks.¹³ The Commission also should make clear

¹² In 1996, the Commission addressed a similar issue as part of its broadband personal communications service ("PCS") D, E, and F Block Order, electing to retain existing equity investment models to preserve business relationships formed in reliance on the Commission's policies. Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Services Spectrum Cap. Report and Order, 11 FCC Rcd 7824, 7837-39 (1996) ("D, E, and F Block Order"). The very same type of reliance is at issue here.

¹³ CMRS Fourth Report and Order, 9 FCC Rcd at 7124.

that the existing attribution and affiliation rules will apply in connection with any spectrum reauctions that are open to previous applicants and current licensees, such as the September 29, 1998, reauction of broadband PCS C block spectrum.¹⁴ C block licensees should not be required to structure themselves differently to participate in a new auction of C block spectrum.¹⁵

¹⁴ See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, FCC 97-342, ¶ 7 (rel. Oct. 16, 1997) ("These options will lead to a reauction of C block spectrum that will be open to all entrepreneurs, all applicants to the original C block auction, and . . . all current C block licensees").

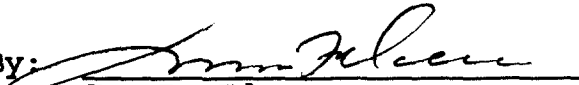
¹⁵ See D. E. and F Block Order, 11 FCC Rcd at 7837 ("making the same equity structures available to both C and F block applicants is necessary so that C block participants will not be required to structure themselves differently to participate in the F block auction").

CONCLUSION

For these reasons, CIRI urges the Commission to clarify that existing designated entity licensees may continue to operate under the attribution and affiliation rules that currently govern their relationships and that such rules will apply in any spectrum reauctions that are open to previous applicants and current licensees.

Respectfully submitted,

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